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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ROMO, Defendant and Appellant.	E047031 (Super.Ct.No. FSBSS702802 & FSBSS801945) OPINION

APPEAL from the Superior Court of San Bernardino County. Gilbert G. Ochoa, Judge. Affirmed.

Laurel M. Nelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Barry Carlton and Elizabeth A. Hartwig, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Richard Romo appeals from an order extending his involuntary civil commitment to Patton State Hospital (Patton) as a mentally disordered offender (MDO) under Penal Code,[1] sections 2970 and 2972. He contends: (1) the record lacks substantial evidence to support the finding that his severe mental disorder was either not in remission or could not be kept in remission without inpatient treatment; (2) the jury should have been provided with an additional explanation of the legal meaning of "remission," because a prosecution expert witness's testimony on the issue was confusing; (3) the instruction defining remission was nullified by the instruction explaining the meaning of a substantial danger of physical harm; (4) his civil commitment was extended without any allegation or evidence that he was, as a result of his mental illness, unable to control his behavior, and he was therefore a danger to others; and (5) his due process rights were violated by the use of expert testimony that included unreliable hearsay and ultimate legal conclusions. Defendant contends, in the alternative, that any failure to make timely objections to preserve any issue for appeal was the result of ineffective assistance of counsel. We find no prejudicial error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

In 1990, defendant entered a plea of guilty to one count of residential burglary (§ 459) based on his entry of a residence to sexually assault a woman. He was initially placed on probation, but after violating terms and conditions, he was sentenced to four

[1] All further statutory references are to the Penal Code unless otherwise indicated.

years in prison. In 1995, he was transferred to Atascadero State Hospital as an inmate in need of psychiatric treatment under section 2684. It was determined he met the criteria for certification as an MDO under section 2962. In 1997, he was civilly committed under section 2972, and he was transferred to Patton. Successive petitions to recommit him were found true, and his commitment was extended each time.

In July 2007, the People filed petition No. 6 seeking defendant's continued commitment as an MDO. The petition alleged he was presently a patient at Patton with a maximum commitment date of November 1, 2007. The petition further alleged he suffered from a severe mental disorder that was not in remission or could not be kept in remission without continued inpatient treatment, and by reason of his severe mental disorder, he represented a serious danger of physical harm to others.

The trial date was continued numerous times, and on May 6, 2008, the People filed petition No. 7 again seeking to extend defendant's commitment. Petition No. 7 was based on the April 14, 2008, recommendation of the medical director, and the allegations of the petition were substantially similar to those in petition No. 6. The two petitions were consolidated, and jury trial began in October 2008.

Petition No. 7 alleged that defendant was born in 1970. He started using marijuana at age 11 and started abusing other substances at age 14. In 1987, he first received psychiatric treatment after he started talking and laughing to himself, appeared to hear voices, acted aggressively toward his brother and father, and attempted suicide by overdosing with methamphetamines.

In December 1990, he entered a residence and sexually assaulted a woman. At the time, he was experiencing psychotic symptoms, including auditory hallucinations, which told him to do what he had done. He was charged with attempted rape and sexual assault, among other crimes, but pled guilty to burglary under a negotiated disposition and was placed on probation. When he was convicted of another offense, his probation was revoked, and he was sent to prison.

While in prison, he received disciplinary reports for destruction of property, breaking windows, assaults of and physical altercations with other inmates, manufacturing "pruno," and indecent exposure. He was deemed to be psychotic and was transferred to Atascadero. Upon his admission there, he was "'highly disorganized, with inappropriate affect,'" and he reported experiencing auditory hallucinations of voices saying derogatory things and telling him what to do. In 1995, he was certified as an MDO under section 2962. In 1996, while at Atascadero, he was placed in seclusion and full-bed restraints three times because of his aggressive acts. He reported hearing voices telling him he should "'kill 23 people for God.'" He was admitted to Patton in 1998 with a diagnosis of schizophrenia, either undifferentiated type or paranoid type. The petition alleged defendant "currently exhibits ongoing psychotic symptoms including grandiose and paranoid delusions, poor reality-testing and tangential speech. His negative symptoms include social isolation, avolition, and blunted affect."

At trial, Cynthia Jayne, a rehabilitation therapist at Patton, testified she had known defendant 11 years. Defendant had participated in sex offender therapy classes that she led, and he had actively participated in the classes and groups and had made some

progress. Nonetheless, some of the cognitive distortions present at the time of his offense remained and increased the risk of his reoffending. Specifically, defendant had told Jayne that some of the women staff "want[ed] him" or were coming on to him or flirting with him, although he had never acted on those beliefs. Jayne had never seen defendant out of control or acting aggressively. He had never been disciplined for his fantasies or improper behavior.

Amanda Cavicchi, another rehabilitation therapist, had worked at Patton for three years. At one team meeting, defendant was asked about a reported incident where he had touched himself inappropriately in the presence of an evaluator. Defendant repeatedly changed the subject. Cavicchi testified that evading such questions was a common problem with defendant. At another meeting, defendant denied the events had happened as alleged.

Donnie Redl, a social worker, had worked with defendant in the sex offender treatment unit at Patton for about three years, and defendant had participated in several treatment groups with him. In November 2007, defendant revealed having delusions and thoughts that he had not previously disclosed to his treatment team, including thoughts about lacking brain cells and about staff flirting with him. He admitted masturbating during sexual fantasies. In meetings in January, February, and March 2008, defendant again stated he felt female staff members were flirting with him because they smiled and gave him "the look." Defendant was cooperative and attended and participated in all meetings and groups. Redl had never known defendant to act out in a violent way as a result of his fantasies or delusions.

Dr. Bhupinder Nakai was defendant's psychiatrist from 2002 through August 2008, and was then chief of staff at Patton. Dr. Nakai testified that in his opinion, defendant represented "a substantial danger of physical harm to others by reason of his severe mental disorder." He based that opinion "on the fact that he continues to have symptoms that he had at the time of his original controlling offense. It's the same pattern, same behaviors." Dr. Nakai further stated his opinion that defendant would not "be capable of controlling himself sufficiently so he would not be . . . a substantial danger of physical harm to others in the community." Dr. Nakai based that opinion in part on defendant's responses to testing.

Dr. Nakai testified that defendant was having "classic distortions" that staff members were "looking at him with their eyes or movement of their body as if they are masturbating for him or want him to masturbate," and in December 2007 and January 2008, defendant was "actually acting out on those distortions and masturbating more than once on those distorted thoughts." Dr. Nakai testified that defendant "should stop reinforcing this masturbation behavior based on distortions."

Helen Cruz, a registered nurse at Patton, had known defendant for about eight years. She had never had a problem with him, and he was always cooperative.

Mary Richter was a clinical social worker at Patton. Defendant regularly attended a group session she led, and he was never a problem. In October 2007, another patient claimed that defendant had pinched the patient's fingers because the patient had violated defendant's personal space. The entire team discussed the incident with defendant, who

acknowledged he had violated a rule and stated he would do something different the next time.

Dr. Julie Yang, a consulting psychologist, testified defendant had the severe mental disorder of schizophrenia, paranoid type. She based her opinion on risk assessment testing, review of defendant's history, and personal interviews. She testified that defendant had difficulty identifying risk factors. In April 2007, defendant had a high risk of reoffending because he did not have a clear understanding of his mental illness and remained confused about distinguishing reality from fantasy. She concluded the nature of his fixated delusions rendered him dangerous. She further testified her opinion would continue to be the same if defendant's delusional conduct had not changed.

In April 2007, defendant encountered Dr. Yang in a hallway and put his hand in his pants. When Dr. Yang asked him if everything was okay, defendant had turned his back and continued to fondle himself. Although he initially denied it, he later admitted he had in fact been masturbating.

Dr. Mark Thomas Martinez, a staff psychologist at Patton who had been on defendant's treatment team since February 2007, testified that defendant was not in remission from his paranoid schizophrenia. Defendant continued to express "delusional type of beliefs regarding his being extremely attractive to women and women wanting to have sex with him." Defendant reported the female staff members in his unit flirted with him, wanted to have sex with him, and wanted him to masturbate to them. His current thoughts and behaviors were very similar to the thoughts and behaviors he had at the time

of his crimes, but defendant did not recognize they were not part of reality. Defendant continued to masturbate to thoughts that these women wanted him sexually.

Following trial, the jury found that defendant met the criteria of being an MDO, and his commitment was extended for another year.

Additional facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. Sufficiency of Evidence

Defendant contends the evidence was insufficient to establish that his severe mental illness was not in remission or could not be kept in remission.

1. Standard of Review

When we review the sufficiency of the evidence to support an extended civil commitment, we determine "whether, on the whole record, there is substantial evidence from which a rational trier of fact could have found each essential element beyond a reasonable doubt. [Citations.] We must consider all the evidence in the light most favorable to the People, drawing all inferences the trier could reasonably have made to support the finding. [Citation.]" (*In re Anthony C.* (2006) 138 Cal.App.4th 1493, 1503.)

2. Analysis

Defendant points out that numerous witnesses testified as to his good behavior at Patton. Indeed, the record is replete with evidence that his condition had improved significantly over the years. Among other things, he held a position at the greenhouse where he supervised both men and women patients; he participated in his treatment groups and was always cooperative; he had never lost privileges for misbehaving, and in

the year before trial, he had won an award for good behavior and being helpful; he willingly took his medication; he was not known to have had any sexual contacts with patients or staff while at Patton; and since he had been taking Clozapine, he was no longer having auditory hallucinations. Nonetheless, detailing the abundant evidence that might have supported a contrary judgment is an irrelevant task—our mandate is to determine whether the record contains substantial evidence to *support* the judgment. (*In re Anthony C.*, *supra*, 138 Cal.App.4th at p. 1503.)

Defendant asserts the evidence is insufficient to establish that he was not in remission because the expert witnesses provided only their *conclusions* that he was not in remission, and that the record contains no underlying *facts* to support the finding. As the jury was instructed, "The term 'remission' means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support." (§ 2962.)

At trial, Dr. Nakai testified that defendant was not in remission. Dr. Nakai explained that defendant had "a very grandiose belief system, hallucination in nature, that belongs—something to do with his middle name, that Ruben is somebody who is very handsome and girls fall for him and they want him sexually, either in the community, as well as in the hospital. And he continues to believe that even when he is being prescribed these medications and psychotherapy." Dr. Nakai further explained that defendant continued to experience thought distortions in which he would "look at the staff and start thinking that they are looking at him with their eyes or movement of their body as if they are masturbating for him or want him to masturbate," and in December 2007 and January

2008 "he was actually acting out on those distortions and masturbating more than once on those distorted thoughts." In November 2007, defendant denied he had been masturbating to thoughts of staff members, but when confronted with polygraph test results, he stated he had to "adjust his pants because his penis was going to get him in trouble," and then left a treatment session, went to the corridor, and masturbated in public. That incident indicated to Dr. Nakai that future problems of acting out were "[v]ery likely." Dr. Nakai testified that defendant misinterpreted social cues, thinking others were asking for sex, and he was not in control of his delusions. Dr. Nakai concluded defendant was not in remission, because he continued to have delusions in the hospital setting where his medications were carefully administered and monitored.

Dr. Yang testified that defendant was not in remission. She explained that defendant remained a substantial danger of physical harm to others by reason of a severe mental disorder because "these delusions are so fixated it has not changed over the years, he still maintains these delusions that . . . these women are wanting him . . . ." He also "remain[ed] very confused as to distinguishing reality from fantasy." She testified that although he did not show observable signs of his delusions, "the more he is probed, the more the nature of the delusions will still come out." She testified he was "very confused" and could not differentiate between "what is a delusion and what is reality."

Like Drs. Nakai and Yang, Dr. Martinez stated his opinion that defendant was not in remission. Dr. Martinez explained that defendant continued to express the delusional belief that female staff members wanted to have sex with him, were flirting with him, wanted him to masturbate to them, and they masturbated to him as well. Defendant's

thoughts and his behavior of masturbating to the thoughts that women wanted him sexually were similar to the thoughts and behavior he exhibited at the time of his underlying offense.

Similarly, Cynthia Jayne testified that defendant continued to have cognitive distortions that the female staff at Patton wanted to have sex with him, and those were the same false beliefs he had had about women in his neighborhood at the time of his offense. She testified that masturbating to female staff was "deviant behavior."

We conclude the experts went far beyond stating mere conclusions. In each case, they testified as to the specific facts on which they based their opinions.

Defendant argues the evidence did not establish that he was not in remission, because "remission" means the "overt signs and symptoms of the severe mental disorder" are controlled by medication or treatment, and common dictionary definitions establish that the term means clearly evident, open to view, observable, or the equivalent. He posits that a thought disorder is not sufficient to establish lack of remission.

However, Dr. Nakai testified that within the 12 months before trial, defendant had admitted masturbating to false beliefs about female staff. In addition, defendant had pinched another inmate's finger because he believed the other inmate was making advances to him, which Dr. Nakai characterized as "ongoing ideas of paranoid references." Moreover, 18 months before trial, defendant had masturbated in the hallway in Dr. Yang's presence. Although the expert witnesses testified that masturbating to fantasies involving consensual partners was acceptable behavior in the institutional environment when all other forms of sexual interaction were unavailable, those witnesses

distinguished delusions and disordered thinking from such fantasies and testified that defendant had difficulty telling the difference between reality and fantasy. The evidence was sufficient to establish that defendant had acted on his disordered thinking, and thus, that he was not in remission.

B. Sufficiency of Instructions on Meaning of Remission

Defendant contends the jury should have been provided with an additional explanation of the legal meaning of remission because Dr. Nakai's testimony on the issue was confusing.

1. Forfeiture

If defendant believed the instruction was incomplete or confusing, he was required to request further explanation in the trial court. The People note that defendant failed to do so, and he has therefore forfeited the issue for appeal. [A] party may not complain on """"appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested an appropriate clarifying or amplifying language."""" [Citations.]" (*People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130.)

However, defendant contends, in the alternative, that to the extent any issue is deemed forfeited, he received ineffective assistance of counsel. We will therefore exercise our discretion to address the issue on the merits. (See *People v. Smith* (2003) 31 Cal.4th 1207, 1215.)

2. Standard of Review

We review de novo whether a jury instruction is complete and correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218; *People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) "When reviewing a purportedly ambiguous instruction, we ask whether there is a reasonable likelihood the jury misconstrued or misapplied the challenged instruction. [Citations.]" (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.) We must consider defendant's challenge in light of the instructions as a whole, and we assume the jurors understood and correlated all the instructions given. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.)

3. Additional Background

The prosecutor asked Dr. Nakai what remission meant, and Dr. Nakai responded, "Remission means when the symptoms, which we had in the beginning of the testimony, like hallucination[s], no more evidence. Then when a person is not on psychotropic medications, not on any structure setting like a hospital, not seeking any counseling at home. They live in normal life. They are functioning. They have no problems, no functioning problems. Whether they are at home or work or school, they are able to live normal life. [¶] . . . [T]hey are in remission. And Schizophrenia, there is no such thing called in remission."

In response to re-cross examination by defense counsel, Dr. Nakai defined remission as follows: "Remission means the person's behavior is being influenced by those symptoms. So the person may continue to have symptoms and may meet criteria for remission in going—living life, quality of life, but if they are still being influenced by

those symptoms, their behaviors are influenced and they're monitored preventing them to function, then it's not in remission." Dr. Nakai testified that remission "is the behavior. It's the functioning influenced by the symptoms which we are concerned about. We are not concerned about completely having him to admit from hallucination. [¶] . . . [s]o what we are interested in his behavior is not being influenced by those ideas of references that he's not acting out. He was acting out in front of the evaluator Dr. Yang that he started masturbating, so he perceives other people's behavior, other people's appearances and immediately start[s] acting out on those behavior thought processes."

4. Analysis

Defendant's challenge to the sufficiency of the instructions on remission was based solely on the inconsistencies in Dr. Nakai's testimony about the issue—defendant contends the jury could have interpreted his testimony as meaning that "remission required normalcy without medication or treatment."

As noted, we consider the instructions as a whole. Here, the jury was repeatedly instructed that its ultimate task was to determine whether defendant met the criteria of being an MDO beyond a reasonable doubt. The jury was instructed that "[s]ome words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you." The trial court defined remission as "'a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support." Thus, to reach an improper conclusion about the meaning of remission, even in

light of Dr. Nakai's testimony, the jury would have had to ignore the trial court's definition of remission, as well as all the other instructions listed above. However, we presume the jury understood and followed the instructions given. We therefore find that the instructions on remission were complete and correct as given. Defense counsel did not provide ineffective assistance by failing to request clarifying instructions.[2]

C. Consistency Among Instructions

Defendant next asserts that the instruction defining remission was nullified by the instruction explaining the meaning of "a substantial danger of physical harm."

1. Additional Background

The trial court first instructed the jury on the three criteria for being an MDO: (1) defendant has a severe mental disorder (2) that is not in remission or cannot be kept in remission without treatment, and (3) "[b]y reason of the severe mental disorder, [defendant] represents a substantial danger of physical harm to others." The trial court further instructed the jury, "'Severe mental disorder' is defined as 'an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior, or that demonstrates evidence of an acute brain syndrome [from] which prompt remission, in the absence of treatment, is unlikely.'" And, as noted, the trial court instructed the jury that remission is "'a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support,'" and that to find defendant

[2] We further note that counsel on appeal has failed to propose any specific language to clarify the meaning of remission.

could not be kept in remission without treatment, the jury had to find certain overt acts during the prior year. Finally, the trial court instructed the jury with the language of section 2962, subdivision (f): "'Substantial danger of physical harm' does not require proof of a recent overt act."

2. Analysis

Defendant contends the instruction that a "'[s]ubstantial danger of physical harm' does not require proof of a recent overt act" conflicted with the instruction that remission is "'a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support.'" His entire argument on the issue, without citation to authority, is that "[b]ecause the jury was not required to find [defendant's] severe mental illness resulted in a 'serious difficulty' in controlling his dangerous behavior—something necessarily established by recent overt acts—the jury lacked guidance in determining *what* evidence of *what* acts at *what* time was required to support a finding that [his] commitment needed to be extended for another year."

We find the argument meritless. As we discuss below, the jury *was* required, considering the instructions as a whole, to find that defendant's severe mental illness resulted in a serious difficulty in controlling his dangerous behavior. Moreover, contrary to defendant's assertion, that finding did not depend on evidence of recent overt acts—defendant's argument confuses the concepts of "overt acts," required for a finding that he could not be kept in remission without treatment, and "overt signs and symptoms," required for a finding that he was not in remission at all. The jury was not required to

find *both* that defendant was not in remission *and* that he could not be kept in remission—the statute requires that only one of those conditions be established. (§ 2972, subd. (e).)

D. Sufficiency of Allegations and Instructions Concerning Mental Disorder that Caused Defendant to Have Trouble Controlling His Violent Behavior

Defendant contends his right to due process was violated because there was no specific allegation or proof he had a mental disorder that caused him to have trouble controlling his violent behavior, and the trial court failed to instruct the jury that it had to find his severe mental disorder made controlling his behavior seriously difficult or impossible.

"[T]he safeguards of personal liberty embodied in the due process guaranty of the federal Constitution prohibit the involuntary confinement of persons on the basis that they are dangerously disordered without 'proof [that they have] serious difficulty in controlling [their dangerous] behavior.' [Citation.]" (*People v. Williams* (2003) 31 Cal.4th 757, 759 (*Williams*), quoting *Kansas v. Crane* (2002) 534 U.S. 407, 413 (*Crane*).) In *Williams*, our Supreme Court applied the due process standard established in *Crane* to a challenge to a civil commitment under the Sexually Violent Predator Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.).

The defendant in *Williams* contended his commitment was invalid because the statutory language of the SVPA did not include the federal constitutional requirement of proof of a mental disorder that caused "serious difficulty in controlling behavior" (*Crane*, *supra*, 534 U.S. at p. 413), and the jury was not specifically instructed on the need to find

such impairment of control. (*Williams*, *supra*, 31 Cal.4th at p. 764.) Our Supreme Court rejected this argument, holding that the express terms of the SVPA limited persons eligible for commitment to persons "who have already been convicted of violent sexual offenses against multiple victims [citation], and who have 'diagnosed mental disorder[s]' [citation] 'affecting the emotional or volitional capacity' [citation] that 'predispose[] [them] to the commission of criminal sexual acts in a degree constituting [them] menace[s] to the health and safety of others' [citation], such that they are 'likely [to] engage in sexually violent criminal behavior' [citation]. (*Williams*, *supra*, at p. 759, quoting Welf. & Inst. Code, § 6600, subds. (a)(1), (c).) The court held that this statutory language inherently encompassed and conveyed to the jury the requirement of a mental disorder that caused serious difficulty in controlling criminal sexual behavior. The court concluded that, because the jury instructions tracked the statutory language, including the SPVA's definition of a "'diagnosed mental disorder,'" no additional instruction was necessary. (*Williams*, *supra*, at p. 759.)

In *People v. Putnam* (2004) 115 Cal.App.4th 575 *(Putnam*), the court applied the same principles to the MDO civil commitment scheme. The *Putnam* court held that even though *Williams* involved a different statutory scheme, the *Williams* court's rationale also foreclosed the argument for MDO civil committees: "In the MDO context, just as in the SVPA context, instructing the jury with the applicable statutory language adequately informs the jury of the kind and degree of risk it must find to be present in order to extend an MDO commitment." (*Putnam,* at pp. 581-582.) The *Putnam* court reasoned that the instructions that tracked the MDO statutory elements and definition of severe

mental disorder "informed the jury that in order to find that appellant had a severe mental disorder, it had to find that he had 'an illness or disease or condition that substantially impair[ed] [his] thoughts, perception of reality, emotional process, or judgment, or which grossly impair[ed] [his] behavior.' Moreover, in order to find that the disorder was not in remission, the jury had to find that 'the overt signs and symptoms of the severe mental disorder' were not under control. Finally, the jury was instructed it had to find that '*by reason* of such severe mental disorder, [appellant] represents a *substantial* danger [of] physical harm to others.'" (*Putnam, supra,* at pp. 581-582.) Taking these instructions as a whole, the court concluded the jury could not have sustained the section 2970 petition without having found that, "as a result of [the defendant's] mental disorder, he suffered from a seriously and substantially impaired capacity to control his behavior, and that, for this reason, he represented a substantial danger of physical harm to others. In other words, the instructions given here, which tracked the language of the MDO statute, necessarily encompassed a determination that [the defendant] had serious difficulty in controlling his violent criminal behavior, and thus, . . . separate instructions on that issue were not constitutionally required. [Citation.]" (*Putnam, supra,* at p. 582, fn. omitted.)

Here, as in *Putnam, supra,* 115 Cal.App.4th at pp. 581-582, the jury instructions defined the statutory elements of an MDO finding. As in *Putnam*, the instructions informed the jury that a "'[s]evere mental disorder' means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior . . . ." The instructions stated that, to find that the disorder was not in remission, the jury had to find that "'the overt

signs and symptoms of the severe mental disorder'" were not under control. Finally, the instructions stated the jury had to find that, "[*b*]*y reason* of his mental disorder, [defendant] represented a *substantial* danger of physical harm to others." (Italics added.)

Defendant argues, however, that *In re Howard N.* (2005) 35 Cal.4th 117 (*Howard N.*) undermined *Putnam.* We disagree. In *Howard N.*, the court addressed Welfare and Institutions Code section 1800 et seq., which provides procedures for the extended civil detention of mentally disordered juvenile offenders. (*Howard N.*, *supra*, at p. 122.) The *Howard N.* court first held that despite the absence of an express statutory requirement, it could construe the extended civil detention statutory scheme to require a demonstration that the person has serious difficulty controlling his dangerous behavior. (*Id.* at pp. 132-135.) However, unlike the SVPA and the MDO, the extended civil detention statutory scheme did *not* include a definition of "'mental . . . deficiency, disorder, or abnormality'" linking the defendant's mental disorder to a lack of volitional control. (*Howard N., supra,* at p. 136.) Rather, the extended civil detention statute permitted the extension of a commitment upon a mere finding that the person is "physically dangerous to the public because of his or her mental or physical deficiency, disorder, or abnormality . . . ." (Welf. & Inst. Code, § 1801.5.) Consequently, unlike in *Williams*, *supra,* 31 Cal.4th 757, jury instructions tracking the statutory language of the extended civil detention scheme would not necessarily inform the jury of the required showing that the mental disorder impaired the ability to control dangerous behavior, and an additional instruction was required, and the instructional error was not harmless on the

facts of that case. (*Howard N., supra*, at pp. 130, 137-138.) *Howard N.* is therefore distinguishable.

We find the analysis and conclusion of the *Putnam* court persuasive, and for the reasons stated in Putnam, we conclude that under the instructions given, which tracked the MDO statutory language, the jury necessarily found that defendant's mental disorder caused serious difficulty in controlling his dangerous behavior. (*Putnam*, *supra*, 115 Cal.App.4th at pp. 581-582.) Defendant's recommitment as an MDO met federal due process standards.

E. Sufficiency of Evidence Defendant Had Serious Difficulty Controlling His Dangerous Behavior

Defendant further contends the evidence was insufficient to establish that, because of his mental disorder, he had serious difficulty in or was incapable of controlling his dangerous behavior.

We disagree. In *In re Anthony C., supra*, 138 Cal.App.4th 1493, the court found the evidence insufficient to support a finding that the defendant's mental illness or abnormality caused volitional impairment that made him dangerous beyond his control, in part because the People's expert witness had failed to prepare a formal risk assessment, was unable to state risk factors at trial, and was reluctant to quantify risk without further study. (*Id.* at p. 1507.) Here, in contrast, Dr. Yang had conducted a battery of risk assessment tests in early 2007, and she testified that her assessment of defendant's serious difficulty in controlling his behavior would not change if defendant continued to suffer thought distortions. Dr. Martinez testified there had been no substantial change in

defendant's mental status that would change the test results. Thus, we conclude substantial evidence supported the jury's verdict.

F. Expert Testimony

Defendant contends the expert witnesses were improperly permitted to recite hearsay from unspecified sources to explain their opinions and to testify to conclusions and ultimate facts that should have been decided by the jury. In the alternative, he contends that to the extent the issues are deemed forfeited because no objections were made in the trial court, his trial counsel provided ineffective assistance by failing to raise appropriate timely objections.

1. Forfeiture

Defendant moved before trial to exclude the "details or contents of hearsay statements" upon which the expert witnesses "formed their opinions, unless the particular hearsay is itself admissible under some exception." However, he failed to object to specific testimony at trial. Although the People contend defendant has therefore forfeited his objections, the People have addressed the issues on the merits. We will exercise our discretion to do the same. (*People v. Smith*, *supra*, 31 Cal.4th at p. 1215.)

2. Hearsay

a. Evidence challenged as legal conclusions

Defendant challenges certain testimony on the ground that the experts merely stated legal conclusions. He objects to the testimonies of Drs. Yang and Nakai that (1) defendant has a severe mental disorder, namely paranoid type schizophrenia; (2) defendant was not in remission; and (3) he represented a substantial danger of

physical harm to others because of his severe mental disorder, and (4) if released, there was a high risk he would reoffend.

First, we note Evidence Code section 805 states, "Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." Thus, even though the witnesses' opinion testimonies went to the ultimate issues in the case, their opinions were admissible.

Next, we note the experts' opinions were not unsupported. Dr. Nakai's opinions were based on interviewing defendant, examining his background and history, and discussing his care with other treatment providers. Dr. Yang similarly detailed the bases for her opinions, including her extensive risk assessment testing, examination of defendant's medical records, meetings with defendant, and consultations with his treatment team members. We conclude there was no error in the admission of the challenged testimony.

b. Evidence challenged as hearsay

Assistance of Counsel

Defendant contends his counsel provided ineffective assistance by failing to object to the admission of hearsay testimony through the expert witnesses.

In *People v. Campos* (1995) 32 Cal.App.4th 304, the trial court explained the use of hearsay in forming the basis of experts' opinions: "Psychiatrists, like other expert witnesses, are entitled to rely upon reliable hearsay, including the statements of the patient and other treating professionals, in forming their opinion and concerning a patient's mental state. [Citations.] On direct examination, the expert witness may state

the reasons for his or her opinion, and testify that reports prepared by other experts were a basis for that opinion. [Citation.] [¶] An expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by nontestifying experts. ‘“‘The reason for this is obvious. The opportunity of cross-examining the other doctors as to the basis for their opinion, etc., is denied the party as to whom the testimony is adverse.’”’ [Citations.]” (*Id.* at pp. 307-308.) In *Campos*, the court found error in the admission of a psychiatrist’s testimony about facts provided by others, but found the error harmless in light of the facts that the erroneous testimony was only a small portion of the witness’s lengthy testimony. (*Id.* at pp. 308-309.)

Here, however, the evidence defendant challenges was, for the most part, not “facts provided by others,” but was information that, on its face, came from defendant himself. Defendant objects to Dr. Yang’s testimony that he started using marijuana when he was 11 years old, but he omits the next statement she made: “*He stated that he started using marijuana at that age*.” (Italics added.) Similarly, Dr. Yang’s challenged testimony about defendant’s early drug use was obviously based on defendant’s own reports: “At 14 . . . he started to experience other street drugs, such as LSD, PCP and *his words* speed. [¶] And at 16 he started using speed on a regular basis, *which he meant by that daily*.” (Italics added.) Defendant objects to Dr. Yang’s testimony about defendant’s poor job performance, but Dr. Yang testified that defendant had “give[n] that information to [her] that was the cause of him leaving the jobs.” Defendant objects to Dr. Yang’s testimony that he had fathered a child. However, she testified “they are his own statements.” Defendant objects to Dr. Yang’s testimony about two trespassing

incidents. However, she testified, "*when I asked him* about those trespassing incidents, he did say those were times when he actually entered a woman's home and masturbated while they were asleep." (Italics added.) Defendant objects to Dr. Yang's testimony about an incident in which defendant had entered his sister-in-law's home while she was sleeping and had started to masturbate. However, Dr. Yang further testified that defendant had described the incident to her in detail. Defendant objects to Dr. Yang's testimony based on a police report of the offense for which he had been charged. However, she further testified that in talking with him about his offenses, he had "indicate[d] that he had done similar type of action to other people before then." Moreover, Cynthia Jayne testified that defendant had described to her how he had been arrested for similar behavior. Defendant objects to Dr. Yang's testimony that defendant had engaged in sexual activities with a neighbor who had fostered children living in the home. However, she testified that "[v]ery early on [defendant] *reported* that he was actually engaged in" those activities. (Italics added.)

Finally, the testimony of Dr. Nakai to which defendant objects consisted of descriptions of defendant's hallucinations and thought distortions. By its nature, such information could have come only from defendant and therefore constituted admissions rather than inadmissible hearsay. (Evid. Code, § 1220).

Moreover, the jury was instructed that "[e]ach of the experts testified that in reaching their conclusions as an expert witness, they considered statements made by [defendant]. You may consider those statements only to evaluate that expert's opinion.

Do not consider those statements as proof that the information contained in the statements is true."

We thus find no merit to defendant's contention that his counsel was ineffective for failing to raise hearsay objections to the challenged testimony because such an objection would have been unavailing. (See *People v. Gray* (2005) 37 Cal.4th 168, 207.)

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

MILLER
J.